United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1194

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT L. WOLF,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Robert L. Wolf appeals from a judgment of conviction entered on January 18, 1974 in the United States District Court for the Southern District of New York, following an eight-day jury trial before the Honorable Inzer B. Wyatt, United States District Judge.

Indictment 73 Cr. 486, filed May 24, 1973, containing eight counts, charged Wolf in Counts One through Four with attempted evasion of his individual income taxes for the years 1966 through 1969, in violation of Title 26, United States Code, Section 7201. Counts Five through Eight accused him of subscribing false tax returns under penalties of perjury for the same four years, in violation of Title 26, United States Code, Section 7206(1). Trial commenced on November 13, 1973, and concluded on November 27, 1973, when the jury found Wolf guilty on each count.

On January 18, 1974, Judge Wyatt sentenced Wolf to concurrent terms of two years' imprisonment on each of the four evasion counts, but provided that he be actually confined for only two months and be placed on unsupervised probation for two years, and fined him $1,000 on each of the four false returns counts. Wolf is presently released on his own recognizance pending the disposition of this appeal.

Statement of Facts

A. Government's Case

Robert Lawrence Wolf was a physician conducting his own general practice in Manhattan prior to and during 1966 through 1969. An internist, he was also on the staff of Mt. Sinai Hospital and taught at that institution's Medical School (Tr. 283-85).*

1. Preparation of the Tax Returns

Wolf's tax returns for the 1966 through 1969 calendar years were prepared by Benjamin N. Edelstein, a Certified Public Accountant (GXs 1, 2, 3 and 4). Edelstein provided no bookkeeping services for Wolf and rarely saw any of Wolf's original records. Rather, the primary data relied on for preparation of the returns consisted of columned, chart-form summary sheets, prepared by Wolf, which purported to detail Wolf's income and deductions (Tr. 26-44, 308-10; GXs 11A-11D, 12, 12A, 12B, 13A, 13B, 14A and 14B).

Paid only to prepare the returns, Edelstein made no efforts to independently verify the information provided by

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*"Tr." refers to the trial transcript. Where hereinafter used, "H. Tr." refers to the 17 page transcript of the pre-trial proceeding on November 7, 1973; "App. Br." refers to appellant's brief; "GX" refers to Government trial exhibits; "DX" refers to defense trial exhibits; and "J. Ap'dx" refers to the Joint Appendix.

Wolf. If he had questions or wanted additional information he would normally obtain it by telephone from Wolf. Completed returns were reviewed by Wolf and Edelstein in the latter's office, where Wolf would sign the returns for subsequent filing by Edelstein (Tr. 44-46).

2. Falsification of Wolf's Records

Even though Wolf employed the same secretary, Rita Milcznski, from 1961 to May, 1969, he never permitted her to open the office mail, reserving to himself exclusive responsibility therefor. He generally participated in other routine office chores, including bookkeeping, recording of receipts and making bank deposits. In late 1965 or early 1966, for the first time, Milcznski was allowed by Wolf to make entries in his looseleaf daily receipts book. On that first occasion, he told her that his returns were being audited. Giving her a quantity of clean looseleaf sheets along with filled-out sheets from the daily receipts book, Wolf instructed Milcznski to rewrite the daily receipts sheets. However, lines had been drawn through the names and payment entries of various patients on the daily receipt pages, with respect to which Wolf instructed Milcznski to use care not to include any such lined-out entry in the rewritten pages. He further instructed her to use different pens so that it would appear that the rewritten sheets had been written in the normal course of events, rather than at one sitting (Tr. 287-95).

After a few subsequent occasions of deleting receipts information, Wolf reduced the future need therefor by instructing Milcznski simply not to record certain fee payments. He identified whatever receipts he did not want recorded by underlining the names of the patients concerned on his monthly billings records. Some of the underlined names were the same as those which had been deleted from the altered daily receipts book. This practice con-

tinued at least until Milcznski resigned from Wolf's employ in May, 1969 (Tr. 292-94).*

3. The Five Local Bank Accounts/Cashing Fee Checks/GX 15

After Wolf separated from his wife in 1967, he frequently cashed (as distinguished from depositing) large quantities of his patients' fee checks. When medical receipts were deposited, Wolf spread them over at least five separate local bank accounts, including, a Chemical Bank checking account, a Barclays Bank of New York checking account, and savings accounts at Chemical Bank, Bankers Trust Co. and the Bank of New York (Tr. 295-306, 122-28, 135-46, 181-206, 215-43, 340, 395-409, 507-21, 585-600; GXs 24-27, 32-36, 41A, 42A, 43-47, 48A, 48B, 51, 56A).

Notwithstanding the substantial direct cashing of fee checks and the scattering of income deposits over the different accounts, Wolf told the preparer of his tax returns by letter dated February 23, 1970, that he deposited all of his medical receipts into the Chemical Bank checking account during 1965 through 1968 (GX 15; Tr. 50-51).**

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* On cross-examination, Milcznski admitted that, under oath, she gave wholly different versions of the facts to Internal Revenue Service (IRS) investigators, explaining that she had then lied out of loyalty to Dr. Wolf. She further admitted a wilful failure to report her wages paid by Wolf as taxable income. She added that Dr. Wolf himself had told her not to do so because her wages were small (Tr. 313-14, 323-43).

** Addressed to Benjamin Edelstein and signed by Wolf, the letter reads in pertinent part:

"Dear Ben:

"Just a note to remind you that the total amount of money deposited in *my checking account for the years* 1965, 1966, 1967, 1968 reflects not only *the total amount of money which I received from the practice of medicine* but also deposits into *this checking account* of the checks which I received from the sale of securities (which are deposited in *this account* in order to prevent deficits and to be able

4. The IRS Investigation/Discovery of the Swiss Account

The fraud investigation which led to Wolf's indictment began in February or March, 1970. Wolf gave Edelstein his power of attorney, signed October 21, 1970, to represent him before IRS in connection therewith. Thereafter, in response to several direct inquiries, Edelstein told IRS agents that Wolf denied ownership of any foreign bank accounts. On one such occasion Wolf personally made this assertion in a telephone conversation with Edelstein after being apprised that the IRS agents were then with Edelstein and that the information would be relayed to them (GX 16; Tr. 46-54, 390-91, 487-500).

Then in July, 1971, Special Agent Morris Skolnick advised Edelstein that his investigation revealed that Wolf did in fact have previously undisclosed accounts at the Union Bank of Switzerland in Zurich and at Barclays Bank of New York. Days later, Edelstein, denying prior knowledge of either account, advised Skolnick that Wolf now acknowledged ownership of a Swiss account and of the Barclays account. But, Edelstein added, Wolf contended that he had paid all of his taxes and that the Barclays account was used exclusively for depositing proceeds from the sale of securities (Tr. 500-03).

In fact, much of the approximately $184,000 deposited in the Barclays account during 1968 and 1969 was identified

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to meet expenses), etc. I can account for every penny deposited in *my checking account* for these years on this basis. *There is no discrepancy between the amount which I received and the amount of money deposited.* Furthermore, since I lecture a great deal at medical meetings I can account for every deduction during these years for conventions, etc" (emphasis supplied).

Wolf's subsequent admissions confirmed that the reference was to the Chemical Bank checking account (Tr. 798, 819-20, 848, 877-85). At all relevant times, Edelstein was led to believe that Wolf had a single account for depositing medical receipts (Tr. 62).

as—and subsequently admitted to be—medical receipts. Barclays records reflected that Wolf utilized the account as a conduit for transferring $179,000 to his secret Swiss account in 1969 (Tr. 208-09, 212-15, 594, 848-50, 877-85, 890-91; GXs 49, 49A and 561).

Over the course of the fraud investigation, IRS agents scrutinized thousands of deposit tickets, cancelled checks, bank statements and other documents and interviewed numerous persons, including a sampling of Wolf's patients (Tr. 487-529, 581-617). The total annual deposits found in Wolf's five American accounts were:

1966	$ 76,239.34
1967	65,346.25
1968	97,173.26
1969	304,647.86*

The bank deposits/cash expenditures method ** was then utilized to determine Wolf's taxable income for the four years (Tr. 504, 604-05). Hence, non-taxable items, including refunds, bank credits, transfers between accounts and loans were eliminated from the annual totals. To mini-

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* GX 7; J. Ap'dx J. 31; Tr. 602-05.

** The "bank deposits" theory is: Where it is proved that the taxpayer has a business or calling of a lucrative nature, and that during the taxable years involved he made regular periodic deposits of money in bank accounts in his own name, or in accounts over whch he exercised dominion and control, this is evidence that he has income; and if the annual total of such deposits exceeds exemptions and deductions, the balance represents taxable income. *See United States* v. *Slutsky*, 487 F.2d 832, 840 (2d Cir. 1973); *Gleckman* v. *United States*, 80 F.2d 394 (8th Cir. 1935), *cert. denied*, 297 U.S. 709 (1936).

The "cash expenditures" dimension to the case consisted of proof that during a nine month period in 1967 and 1968, rather than simply drawing checks on one of his bank accounts, Wolf paid cash for nine bank money orders worth a total of $9,245.77 and made them out to a brokerage company with which he had a regular account (GX 37; Tr. 238-43, 407-09, 582-84).

mize to the fullest any possibility of counting any income item more than once, doubt as to the taxability of a given item was resolved in favor of Wolf. All deductions of any sort claimed on Wolf's returns were deliberately unchallenged * (Tr. 611-14, 724-25, 727, 729-30, 732, 889). The final computations were set forth in GX 8 (J. Ap'dx 32):

TAXABLE INCOME

Year	*Per Return*	*Corrected*	*Increase*
1966	$10,819.63	$35,121.05	$24,301.42
1967	4,659.58	27,082.88	22,423.30
1968	12,412.09	54,870.62	42,458.53
1969	3,699.25	46,370.80	42,671.55
Total	$31,590.55	$163,445.35	$131,854.80

TAX LIABILITY

Year	*Per Return*	*Corrected*	*Deficiency*
1966	$ 2,221.30	$13,863.94	$11,642.64
1967	791.92	9,603.93	8,812.01
1968	2,867.83	26,556.62	23,688.79
1969	666.86	21,494.69	20,827.83
Total	$ 6,547.91	$71,519.18	$64,971.27

In sum, Wolf's true taxable income for the four years was at least $131,000, whereas he reported less than $32,000, an understatement of more than 75% (Tr. 833-36).

* This was a fairly generous gesture, for according to Wolf's returns he lost money from private practice in 1967 and 1969, even though he had been in practice by then for more than ten years, with a steadily increasing clientele (Tr. 526, 731, 890-91). If the returns were to be believed, even his token tax payments of $791.92 in 1967 and $666.86 in 1969 would not have been owed but for his substantial earnings from securities transactions in those years (GXs 2 and 4; Tr. 890-91).

B. The Defense

Wolf called as witnesses, his mother, a sister, an accountant from Mt. Sinai Hospital and himself (Tr. 746-61, 767-908). His sister testified that, although she never made any written records thereof, she had loaned her brother an approximate total of $8,000 in varying amounts during 1966 through 1969. Each loan had been in cash and none had been repaid (Tr. 746-52).

Wolf's mother testified that from 1959 through 1969, without ever making any record thereof, she gave Wolf various sums totaling perhaps between $15,000 to $18,000, invariably in cash. On cross-examination, she said that her son did not support her. After being read a portion of an affidavit in which Wolf swore that he did help support her, she stated that Wolf had given her ". . . a few dollars" over the years since 1959, whenever she was short of cash (Tr. 752-61; GX 91).

Peter L. Wen, the Mt. Sinai Hospital Director of Finance, testified that Wolf often travelled as a medical consultant and presented papers at scientific conferences during 1966 through 1969. Mt. Sinai business records documented the fact that Wolf received advances or reimbursements for such travel expenses (Tr. 767,69; DXs O, P, Q & R).

Wolf's Own Testimony

1. *Background and Travel Reimbursements*—Testifying in his own behalf, against the advice of his trial counsel (Tr. 783), Wolf stated that he was a 1952 medical school graduate, licensed to practice in Connecticut, where he resided, California, Florida and New York. He detailed a long list of his honors and achievements and emphasized that he had lectured, consulted and attended conferences in Africa, Australia, Europe, South America and the

United States, for which he received reimbursements or advances for travel expenses during the 1966-69 period (Tr. 783-91, 845-47, 854-55).

2. *Preparation of His Returns*—Edelstein prepared his tax returns from 1966 through 1971. The accountant would specify the data wanted for that purpose, which Wolf and his secretary would compile. As presented in Court, certain entries on the summaries prepared by him at Edelstein's request appeared to have been inexplicably altered to increase deductions. Additionally, other sheets given to Edelstein which reflected summaries of his check deposits were not introduced into evidence and were apparently not accounted for (Tr. 791-95, 803-04, 808-09, 818-25; GXs 12A, 13A & 14A).

Edelstein invariably prepared the returns just before the filing dates and never discussed the contents thereof in any detail. On each occasion when he went to Edelstein's office to sign the returns, Edelstein expressly refused to produce the returns until Wolf paid his fee (Tr. 800-03, 814-16, 822, 827, 831-33). Nevertheless, he conceded on cross-examination he continued to retain Edelstein for preparation of his returns through 1971, even though he felt offended by the accountant's behavior (Tr. 876).

3. *The Bank Accounts*—At no time during the 1966-69 period did Edelstein ask him about any account other than the Chemical checking account. But on cross-examination Wolf conceded that he never volunteered the information either. He explained that since Edelstein was a Certified Public Accountant, presumably he knew what information to ask for and had a responsibility to do so. Further, he never denied ownership of the Barclays and Swiss accounts or of any other account. Rather, he simply was never asked about them. And although he transferred funds from his Barclays account to a Swiss bank, this was done for the exclusive purpose of preserving the money for his

son, in the face of threats by the defendant's estranged wife that she would obtain as much of his money as possible (Tr. 798, 819-20, 834-35, 848-50, 877-85, 890-91).

It was further conceded that he deposited medical receipts into all of his accounts. Nevertheless, he insisted on cross-examination that his letter to Edelstein (GX 15) stating that all of his medical receipts were deposited in the Chemical checking account was ". . . 100 per cent true." The explanation was that he deposited non-taxable as well as taxable items into the Chemical account and the non-taxable items offset the taxable income which he deposited into the other accounts. It was further admitted that he cashed patients' fee checks without depositing them. Wolf asserted that this practice was consistent with his statement in GX 15, that he deposited all of the receipts into the Chemical checking account ". . . because the checks that were cashed for cash would be placed in my safe deposit box which eventually would then be deposited into one of my bank accounts" (Tr. 879-84, 899-901; J. Ap'dx 33).

4. *Loans and Gifts from Relatives*—Wolf corroborated the testimony of his mother and sister that he had received unrecorded cash gifts and loans from them (Tr. 850-54). Confronted on cross-examination with the affidavit in which he stated that he contributed $125 a week to the support of his mother ". . . for many months" and with his mother's earlier testimony that she was never dependent on him for support, Wolf affirmed the truth of the affidavit. He said he gave his mother the money to help out during the period before and after his late father's final illness, up until the will was probated in May, 1967. When it was pointed out to him that if he gave his mother $125 a week for a year, the total exceeded his reported income for that period, he conceded the point, but added that he did not literally mean that he gave his mother $125 every single week during that period. Furthermore, he explained, his father had given him various sums, totaling between

$1,000 and $2,000 in cash during his long illness, terminating in death in December, 1966 (Tr. 850-54, 867-75, 904; GXs 90 & 91).

5. *Lack of Knowledge and Wilfulness*—Wolf testified that he never told Rita Milcznski, his former secretary, to falsify his books and records. Nor did he ever advise her not to report her wages from him as income. In fact, he fired Milcznski—after nine years—for inefficiency (Tr. 836-38).

It never occurred to him that he had many, many thousands of untaxed dollars on hand during 1966-69 and he never had reason to question the accuracy of his returns. He acknowledged, however, that the proof at trial satisfied him that the returns were in fact inaccurate (Tr. 859, 885-86).

ARGUMENT

POINT I

Wolf was not deprived of the effective assistance of counsel.

Wolf claims that he was denied his right to counsel of his choice under the Sixth Amendment because of Judge Wyatt's refusal to grant a pre-trial adjournment to enable him to obtain new counsel to replace his retained trial attorney, Murray Appleman, who was allegedly incompetent. He argues that Appleman was inexperienced and unprepared and that mutual hostility between them made it impossible for him to be adequately represented. These assertions are without merit. At the time he became dissatisfied with his previously retained attorney, Wolf had ample time to retain substitute counsel and failed to do so. Moreover, he has shown no prejudice from his trial lawyer's conduct of the defense or from Judge Wyatt's proper exercise of his discretion to refuse to delay the trial.

The indictment in this case was filed on May 24, 1973, nearly six months before the trial commenced on November 13. On June 14, three weeks after the filing of the indictment and five months before the trial, the parties were notified of the November 13 trial date. Wolf had retained Murray Appleman to represent him at least as early as April 10, that is, during the pre-indictment stage of the case. They conferred in person on at least twenty-three occasions thereafter (H. Tr. 2-17). By letter dated October 30, Appleman advised Judge Wyatt that Wolf had informed him as early as October 24 that he wanted a different lawyer for the trial. Promptly, by letter also dated October 30, the defense was informed that Judge Wyatt would not grant a postponement (J. Ap'dx 6-7).

No explanation has yet been offered as to why Wolf simply did not discharge Appleman on October 24, or sooner, and retain whomever he wished. Appleman's letter of October 30 did state that Wolf wanted to retain the eminent Louis Bender, Esq. as trial counsel, but added that Mr. Bender would not accept the case unless a continuance were obtained. The continuance was said to be necessary ". . . solely due to prior commitments" of Mr. Bender (J. Ap'dx 6). No suggestion was then made and none has yet been made that the period from October 30 to November 13, and *a fortiori*, from October 24 to November 13, was insufficient time for Wolf to hire a different lawyer to prepare the case.* Wolf simply failed to retain

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* Wolf stresses that the period from November 7 to November 13 was insufficient for any new lawyer to prepare the case. But the November 7 date is arbitrarily chosen and is of no significance. On that date Judge Wyatt did nothing more than restate his earlier refusal to grant an adjournment of a trial date of which the defendant had been given five months' advance notice. Similarly, unpersuasive is the suggestion that tardy government compliance with discovery obligations precluded an earlier realization that new counsel was necessary. Discovery was provided on October 12, more than a month before trial (App. Br. 3, 5, n. 4, 7, 30; J. Ap'dx. 6).

some one else and agreed at the commencement of the trial to let Appleman represent him (Tr. 3).

Under all the circumstances, Judge Wyatt's refusal to grant an adjournment was clearly not an abuse of discretion. *United States* v. *Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *United States ex rel. Baskerville* v. *Deegan*, 428 F.2d 714, 716-17 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970).

It should also be noted that Wolf's good faith in his representations to the Court was open to serious question. For example, in personally requesting an adjournment from Judge Wyatt, he claimed that he had been denied an adequate opportunity to present his side of the story before being indicted for tax evasion. The fact of the matter is that he had routinely broken appointments with the IRS, refused to accept certified mail sent to his office, and elected to invoke his Fifth Amendment privilege against self-incrimination rather than offer an explanation or defense to the grand jury which indicted him (H. Tr. 8-9). His self-serving claim that he only learned some three or four weeks before trial that his retained counsel of almost six months had never before tried a tax case, even if true, carefully obscured the fact that Mr. Appleman was an accountant and former IRS Special Agent and was thus substantially experienced in tax matters (H. Tr. 16-17). Wolf also tried to place the onus for his having run off to Europe for a conference for several weeks between indictment and trial on his attorney and on appeal claims that Appleman's silence in the face of such accusations is an admission of their truth (H. Tr. 5-6, 16-17; App. Br. 5-6).* A more probable explanation lies in Mr. Appleman's

* Wolf is a highly-educated, world-traveled person, the author of numerous articles and much in demand as a speaker, having lectured all over the world (Tr. 316-18, 344, 784-88, 887-89). He showed at trial that he was a man of acute perception. For

dignified refusal to bicker with his client in front of the Court and his proper reluctance to infringe on the attorney-client privilege (H. Tr. 14).

In any event, the ultimate question is whether the representation of Wolf by Appleman was so poor as to have made the trial a "farce or mockery of justice" or was "shocking to the conscience of the Court." See *United States* v. *Sanchez,* 483 F.2d 1052, 1055-59 (2d Cir. 1973); *United States ex rel. Walker* v. *Henderson,* slip op. 1223, 1225, — F.2d — (2d Cir. January 7, 1974); *United States ex rel. Crispin* v. *Mancusi,* 448 F.2d 233, 237 (2d Cir.), *cert. denied,* 404 U.S. 967 (1971). No such prejudice has been remotely demonstrated.

Wolf's allegations of incompetence are large in number. Most, however, confuse clumsiness with ineffectiveness and some simply misinterpret a cold record.* It is true that

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example, he alone, among the judge, the prosecutor, defense counsel and the judge's law clerk, noticed Judge Wyatt's failure to use the word "not" in one of his jury instructions which he successfully pointed out for correction (Tr. 1027). With such obviously high intelligence and perception, Wolf's disingenuous posture before this Court and below with respect to being misled by counsel is highly suspect.

Additionally, the trial was halted for two days when Dr. Wolf checked himself into Doctor's Hospital, more than halfway through the Government's case, claiming that he was suffering from bleeding ulcers. After extensive tests, two separate physicians testified that they were unable to find any evidence of bleeding ulcers. Wolf returned to court only after the Court notified him that a bench warrant would be issued. Thereafter, no questions as to Dr. Wolf's health arose (Tr. 534-79).

* For example, Appleman's objection to the admission of certain Blue Cross—Blue Shield records based on "[his personal] experience" (App. Br. 22) was meant and taken as a joke by all involved. While the transcript admittedly does not reflect the laughter which ensued, the surrounding context of that portion of the record shows that Appleman made an arguably valid objection which the Court indicated would be overruled. The prosecutor nevertheless voluntarily laid a tighter foundation which, *a fortiori,* would withstand objection. Thereupon, Appleman made the humorous comment (Tr. 445-46).

the prosecutor successfully objected to many of defense counsel's questions or procedures, but the objections largely pertained to procedural mistakes which were cured forthwith. Thereafter, where appropriate, defense counsel was in fact allowed to read from documents as requested (Tr. 82, 372; App. Br. 13-14). When necessary, witnesses were permitted to refresh or to try to refresh their recollection (Tr. 385-86, 698; App. Br. 14-16). And surely it is of small consequence that defense counsel occasionally forgot to show exhibits to opposing counsel before offering them in evidence (App. Br. 11-12). Further, the few defense exhibits which were kept out of evidence, arguably only because defense counsel failed to subpoena them or to lay the proper foundation, were of trivial—if any—significance.*

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* Indeed, in this regard appellant only specifically emphasizes Mt. Sinai expense reimbursement checks and DX "N", a request for travel funds from a company named Searles (App. Br. 12-13, 26, 28; Tr. 844-47). In fact, DX "N" was ultimately admitted into evidence (Tr. 845). The exhibit purportedly suggested that the IRS had improperly counted as taxable income, funds which Wolf received as reimbursements or advances for travel expenses. That possibility was remote, however, since Wolf annually had claimed such travel expenses as deductions under "conventions" on his tax returns and the prosecution did not challenge any of his deductions at all (GXs 1, 2, 3 & 4; Tr. 887-89). The same principle applies to the Mt. Sinai checks, the contents of which were doubtlessly introduced in different form through the Mt. Sinai Director of Finance (Tr. 767-83). Put colloquially, a taxpayer cannot "have it both ways." Obviously, if one claims travel expenses as deductions, one must report as income all reimbursements or advances therefor. In any event, there is no suggestion that the amount of money involved could have constituted more than a negligible portion of the nearly $132,000 in unreported income.

Further, appellant's assertion that defense counsel did not *subpoena* any records before trial, which has no support in the record as such, obscures the more relevant fact that he did call the Mt. Sinai Director of Finance as a defense witness who introduced business records which verified that various expense reimbursements were made to Wolf (App. Br. 23, 24; Tr. 767-83, 804-07).

The examples chosen by Wolf do show his counsel's lack of experience in trial practice. Nevertheless, Mr. Appleman diligently obtained the assistance of another attorney, Mr. Max Fruchtman (Tr. 55-57, 162, 197, 225, 312, 385, 499). Wolf attempts to dismiss this significant fact by arguing that the record does not reveal the extent of Mr. Fruchtman's contribution (App. Br. 10). While this is correct, it ignores the obvious fact that consultations between Fruchtman and Appleman would be unlikely to become incorporated into the transcript since they would relate to trial strategy and thus by their very nature remain private.

Turning to Wolf's claims that certain measures were not taken before or during trial, it is again clear that he suffered no substantial prejudice. He alleges that Appleman prejudicially failed (a) to present a counter bank deposits analysis through a defense accountant; (b) to subpoena certain bank records before trial; (c) to conduct pre-trial interviews of certain witnesses; (d) to pursue important points at trial and to make sufficient objections to prosecution evidence.*

Other defense exhibits were introduced from various sources, whether they were *subpoenaed* or arrived by some other means (Tr. 1057). The relevance or existence of other documents referred to by appellant became apparent only because of trial testimony and hence prompted defense demands for production during trial (Tr. 108-09, 619; App. Br. 24-25).

* Appellant makes only a conclusory allegation that Appleman rarely objected to the admissibility of evidence or to the authenticity of documents (App. Br. 13, n. 9). A reading of the complete record does not support that conclusion. In any event the argument is pointless in the absence of a showing that particular evidence was in fact improperly admitted. Further, there simply was no genuine issue as to the authenticity of exhibits, which basically consisted of original business records from banks, original checks from a sampling of Wolf's patients and properly authenticated microfilmed records from other businesses. Indeed, defense counsel declined to waive production of the originals of thousands of deposit slips, checks and other documents because of his client's apparent unwillingness to do so (Tr. 3-4).

In fact, the record is silent as to whether a defense counter bank deposits analysis was prepared before the defense opened its case. The Government concedes only that such a counter analysis was not *presented,* which would have been a useless gesture unless it showed substantial miscalculations or improper items in the IRS computations of Wolf's taxable income and tax liability. Wolf did not suggest that such was the case when he testified and he does not do so now. *United States ex rel. Crispin* v. *Mancusi, supra,* 448 F.2d at 237-38. Further, Appleman himself was an accountant and a former Special Agent with IRS (Tr. 16-17) and even appellant acknowledges Appleman's familiarity with the tax field (App. Br. 23, n.13). The utility of performing or presenting a counter analysis was clearly a subject on which he was more competent to make judgments than the average lawyer. The Government supplied him with an extremely detailed preview of the prosecution's case well in advance of trial thus enabling him to assess the most appropriate avenues of defense (H. Tr. 16).

Entwined with the matter of the bank deposits analysis, are Wolf's allegations that Appleman did not timely subpoena certain bank records and IRS documents (App. Br. 24; Tr. 131-35, 146-47, 619-20). Apart from the fact that the bank records information was included in different form in other trial exhibits (Tr. 141, 595; GX 562), and was in fact produced during the trial (Tr. 448-49), the only relevance of the information would have been to dispute the accuracy of the Government's bank deposits analysis. Once again there is no contention that the Government's figures were inaccurate at all much less that any errors were such as to prevent the Government from sustaining its burden that a "substantial" amount of tax had been evaded. *See, e.g., United States* v. *Nunan,* 236 F.2d 576, 585 (2d Cir. 1956), *cert. denied,* 353 U.S. 912 (1957).

Appellant further offers as proof of Appleman's incompetence his failure to press a defense of lack of wilfulness based on Wolf's alleged mental unrest caused by his matrimonial problems (App. Br. 25-26). Judge Wyatt repeatedly made it clear that he would not admit such evidence (Tr. 244-45, 315-16, 449-50). To press the point would have been futile, although Wolf subsequently put the issue before the jury in any event when he testified (Tr. 834-35, 890-91, 905-06). Instructively, appellant does not raise as error on appeal Judge Wyatt's adverse ruling on that or any other occurrence concerning the admission or exclusion of evidence.

It is further alleged, that Appleman did not conduct pre-trial interviews of the two key Government witnesses—Edelstein, the accountant who had prepared Wolf's returns and Milcznski, Wolf's former secretary. To begin with, it is not known whether these individuals would have consented to be interviewed. In any event, both had already given statements to the IRS and both had testified before the grand jury. Pursuant to the Jencks Act, the defense received these statements and thus had substantial material with which to attempt to exploit inconsistencies and to impeach credibility (Tr. 325-29, 330-41, 383-87, 1034-42). *United States ex rel. Crispin* v. *Mancusi, supra,* 448 F.2d at 237-38. During cross-examination Appleman effectively showed that Milcznski had repeatedly lied under oath to IRS agents or in any event gave them information wholly inconsistent with her testimony in the grand jury and on the stand (Tr. 323-41). He brought out that she had failed to report as taxable the wages she earned from Dr. Wolf (Tr. 342, 345). The jury evidently simply chose to believe her rather than Dr. Wolf.

Further, the primary significance of Edelstein's testimony was that all of the information in the tax returns was furnished in secondhand form by Wolf himself and that Wolf never timely disclosed to Edelstein the existence

of certain bank accounts in which [illegible] was depositing business receipts (Tr. 26-44, 53-64; GX 15). Wolf did not dispute either contention when he testified (Tr. 791-98, 879-84). Rather he sought to avoid the damaging implications thereof with the fairly incredible story that since Edelstein was an accountant, he relied on him to ask for the other information—information of which Wolf was exclusively aware (Tr. 878-85). Hence, questions of wilfulness, knowledge, and intent were squarely presented which the jury decided against Wolf after he took the stand—against Appleman's advice—and told his version of the facts.*

The proof against Wolf on these matters was monumental. On direct and cross-examination, he admitted: (1) cashing patient's fee checks without ever depositing the proceeds in his Chemical account (Tr. 899-901); (2) preparation of the secondary information from which Edelstein prepared the tax returns (Tr. 791-98); (3) failure to disclose the Swiss account and the Barclays account to Edelstein prior to the filing of any of his tax returns or that business-derived income went into those accounts (Tr. 879-

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* In pressing Wolf's second point on appeal, the alleged unfairness of Judge Wyatt's jury instruction on credibility, the appellant's brief states:

> "At the trial, questions were raised whether the accountant himself had fabricated the defendant's business deductions (*see, e.g.*, Tr. 68-71, 85-87, 113-15), whether the accountant himself was responsible for failing to report defendant's fees reported on Treasury Form 1099 as part of defendant's gross income (*see, e.g.*, Tr. 369, 381-83, 394), and in effect whether he had exercised the proper diligence and due care required by regulations of the Treasury Department in preparing defendant's returns (*see, e.g.*, Tr. 361-64; D. Ex. G). The accountant's interest in avoiding implication in the alleged fraud and in preserving his CPA license and the right to practice before the Treasury was clear" [App. Br. 47-48].

Wolf ignores the fact that it was Appleman himself who raised those points, through cross-examination and during his summation (Tr. 68-71, 85-87, 113-15, 361-64, 369, 381-83, 394, 924-44).

84); (4) transfers of large sums of money to Zurich, which included medical receipts (Tr. 835, 879-85, 899-901; GX 72B); (5) authoring GX 15, the all-important letter to Edelstein dated February 23, 1970, in which Wolf falsely stated that all of his income had been deposited in his Chemical checking account during the relevant years (Tr. 880-81; J. Ap'dx 37); and; (6) that the Government's proof indeed did establish that his tax returns were false (Tr. 859).

Additionally, Wolf called his sister, his mother and the Mt. Sinai Director of Finance to the stand as part of a substantive defense. In short, Wolf put on a full defense, notwithstanding any technical shortcomings of his trial counsel. The jury chose to believe the overwhelming proof of guilt, much of it from his own mouth.

The cases relied on by appellant on the issue of ineffective counsel largely support the Government. In *United States* v. *Hall,* 448 F.2d 114 (2d Cir. 1971), *cert. denied,* 405 U.S. 935 (1972), this Court, affirming the conviction, held that the defendant waived his right to counsel of his choice by the failure to retain his own attorney within the twelve-day period after he was given notice of the trial. The Court noted that although Hall refused formal appointment of court-appointed counsel, he did allow the attorney which the judge asked to sit in to participate at various points in the trial. 448 F.2d at 116-17.

Similarly, in *United States* v. *Arlen,* 252 F.2d 491 (2d Cir. 1958), this Court affirmed a conviction where the defendant had no lawyer at all at trial. The Court stated that Arlen effectively waived his right to counsel because he ". . . never gave any good reason why he was unable to retain counsel during the time allowed." 252 F.2d at 494-95.

In *United States* v. *Morrissey,* 461 F.2d 666 (2d Cir. 1972), this Court affirmed the conviction where the in-

digent defendant made various claims of dereliction against appointed counsel. The Court noted that the defendant's claim of irreconcilable conflict between him and the lawyer were functionally refuted by, *inter alia,* the fact that the defendant did confer with the lawyer and did allow him to do certain things at the trial although the defendant stood mute at certain points. It was further noted that events at the trial proper cured some of the defendant's more serious allegations against his lawyer. 461 F.2d at 669-70.

Finally, in *United States* v. *Bentvena, et al.,* 319 F.2d 916 (2d Cir.), *cert. denied,* 375 U.S. 940 (1963), this Court's partial reversal was not based on the counsel issue, which it decided in favor of the Government, stating:

> "The test here is whether the lack of effective assistance of counsel was such 'as to shock the conscience of the Court and make the proceedings a farce and mockery of justice'. . . 'the time consumed in oral discussion and legal research is not the crucial test . . . The proof of the efficiency . . . lies in the character of the resultant proceedings . . .'" 319 F.2d at 935.*

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* Other cases cited by appellant are readily distinguishable. For example, the Seventh Circuit reversed the same judge in both *United States* v. *Seale,* 461 F.2d 345 (7th Cir. 1972) and *United States* v. *Koplin,* 227 F.2d 80 (7th Cir. 1955). *Seale* involved multiple findings of contempt of Court against the defendant who was not in substance represented by any lawyer at all and was not permitted to act *pro se.* Formally there was a notice of appearance on file on behalf of the defendant but it was clear that the notice was in reality filed for limited purposes, a fact which the trial judge refused to acknowledge. The *Koplin* case was reversed because the trial judge gave only a few days notice of trial to unprepared defense counsel who had substantial reason to believe that the case would not be called out of turn ahead of over 100 other cases scheduled ahead of it on the Court's trial calendar. Notwithstanding such equities in favor

The counsel problem presented in the instant appeal is far less serious than those of the affirmed cases cited above. Wolf had several months to change counsel, the economic wherewithal to have whomever he wanted, and the intelligence to interview potential counsel critically. Even adopting his own date of October 24 as the date he decided upon changing counsel, he had ample time to do so. As the trial began he was advised of his right to represent himself or to rely on the attorney that he had retained in the pre-indictment stage of the case more than six months earlier. He accepted the retained lawyer and proceeded fully to defend the case, including the calling of witnesses and testifying himself, against the advice of his attorney. In the final analysis, his counsel's performance was far from incompetent and in no significant degree prejudicial. On the basis of overwhelming proof of guilt, he was convicted. There was no reversible error.

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of not forcing the case to trial and even though it was clear that defense counsel had a prior state court trial for the same period, the district judge forced Koplin to trial.

And in *United States* v. *Mitchell*, 354 F.2d 767 (2d Cir. 1966), a selective service case, the defendant asserting his right to additional time to retain counsel, declined all participation in the trial. He called no witnesses, did not testify himself and did not permit the lawyer assigned by the Court over his objections to make objections or motions. This Court reversed the conviction on the counsel issue but cited the described circumstances and the particular problem of Mitchell in finding counsel willing to defend an unpopular cause (draft evasion) by asserting the defense that the United States was involved in wars of aggression and acts of inhumanity and that Mitchell's submission to the draft would render him guilty of complicity.

POINT II

Judge Wyatt's charge to the jury on the credibility of witnesses was entirely proper.

Wolf argues that the portion of Judge Wyatt's charge to the jury concerning the effect of a testifying defendant's interest in the outcome of his trial on his credibility was so unbalanced as to constitute reversible error. The thrust of this argument is that once Judge Wyatt made specific reference to the interest of the testifying defendant, it was unfair not to make similar specific references to the alleged interest of two key Government witnesses, Edelstein and Milcznski. Assuming that exception was properly taken, which it was not, the argument is meritless in any event.*

The language complained of reads:

> "Obviously a defendant has a deep personal interest in the result of his prosecution. In fact, it seems clear that he has the greatest interest of all. Interest creates a motive for false testimony. The greater the interest, the stronger the motive, and the interest of a defendant in the result of his trial is of a character possessed by no other witness" (Tr. 1021).

No express reference was made to any Government witness. But in addition to the sentences complained of by appellant, Judge Wyatt said considerably more on the

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* Wolf personally excepted to the relevant portion of the charge because of ". . . the strong way" in which it allegedly was framed. Rule 30 of the Federal Rules of Criminal Procedure states in pertinent part: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto . . . stating distinctly the matter to which he objects and the grounds of his objection." No request for a particular charge on credibility or interest was made by the defense and Wolf did not enlarge on his reasons for disliking the charge given.

subject of credibility. Taken as a whole, the charge was balanced and proper in all respects.* *United States* v.

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* The full instruction on credibility reads:

Now, members of the jury, I have emphasized repeatedly that the jury and the jury alone decides all issues of fact which, of course, involves passing on the credibility of witnesses. How do you determine whether witnesses are telling the truth? You use your ordinary common sense which you by no means leave behind when you come to this courthouse and when you retire to your jury room. As practical men and women you draw at your experience, your meeting and dealing with people in your everyday business and social life. In passing upon the credibility of the witness you may take into account inconsistencies or contradictions in his or her testimony, conflict with the testimony of another witness, omissions in prior testimony, conflict with prior testimony such as that before the grand jury, or any prior statement of material matters as to which he or she testified upon the trial.

The degree of credit to be given a witness should be determined by the demeanor, the relationship to the controversy and to the parties, the bias or impartiality, the reasonableness of his or her statements, the strength or weakness of his recollection viewed in the light of all other testimony and the attendant circumstances in the case.

You observed the witnesses. You heard their testimony. How did they strike you? Did their answers seem frank, open, truthful, candid? How did each witness impress you? And so you take each one and on the basis of your everyday experience you determine whether or not you believe the witness and to what extent you believe him.

If anyone is found by you to have any interest in this matter, this is a factor which you may take into account in determining the credibility of that witness.

Members of the jury, the law permits but does not require a defendant to testify in his own behalf. This defendant has testified, has taken the witness stand here. Obviously a defendant has a deep personal interest in the result of his prosecution. In fact, it seems clear that he has the greatest interest of all. Interest creates a motive for false testimony. The greater the interest, the stronger the motive, and the interest of a defendant in the result of his trial is of a character possessed by no other witness. In appraising his credibility you may take the fact of interest into consideration. However, it by no means follows that

Rosa, Dkt. No. 73-2324 (2d Cir., March 25, 1974), slip op. at 2351-52; *United States* v. *Hernandez,* 361 F.2d 446, 447 (2d Cir. 1966); *Cupp* v. *Naughten,* 42 U.S.L.W. 4029, 4030 (U.S. December 4, 1973).

Appellant correctly acknowledges that the following balancing instruction was given concerning the possible interest of any witness:

> "If anyone is found by you to have any interest in this matter, this is a factor which you may take into account in determining the credibility of that witness" (Tr. 1021).

Further, immediately after the challenged portion of the charge was given, Judge Wyatt charged that having an interest in the case did not necessarily mean that the witness concerned would testify falsely, stating:

> "However, it by no means follows that simply because a person has a vital interest in the result that he is not capable of giving a straightforward and truthful account of events. It is for you to decide to what extent, if any, his interest has affected or colored his testimony" (Tr. 1021).

Wolf cites no authority to the effect that to be "balanced" means that a charge on credibility must expressly

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simply because a person has a vital interest in the result that he is not capable of giving a straightforward and truthful account of events. It is for you to decide to what extent, if any, his interest has affected or colored his testimony.

If you find that the defendant gave false statements or caused false statements to be made to Internal Revenue Service agents in an attempt to clear himself, you may consider whether this is circumstantial evidence pointing to a consciousness of guilt. It may be a reasonable inference that an innocent person does not ordinarily invent or fabricate to establish his innocence. What signficance, if any, to attach to such conduct if you find that there was such conduct in this case is, of course, entirely for the jury (Tr. 1019-22).

refer to the interest of prosecution witnesses who conceivably have a stake in the outcome of the trial. Far from supporting his contention that the credibility instruction in this case was unfair, the cases cited by appellant from this Court approve language which was materially similar to—or stronger than—that used by Judge Wyatt below. In *United States* v. *Mahler,* 363 F.2d 673, 678 (2d Cir. 1966) this Court approved language that "it is perfectly obvious to all of you the man in this case with the deepest, greatest interest is the defendant himself." Moreover, in *Mahler* the contention presently made by Wolf was rejected in a context where the critical Government witnesses were cooperating accomplices. Thus the allegation of imbalance in emphasizing the defendant's special interest was more serious than in the instant case. In *United States* v. *Sullivan,* 329 F.2d 755, 756 (2d Cir.), *cert. denied,* 377 U.S. 1005 (1964) this Court approved the language: "You know that, of course, the defendant is interested—vitally interested—in the outcome of a case, his case." Further, in *United States* v. *Sclafani,* 487 F.2d 245, 257 (2d Cir.), *cert. denied,* — U.S. — (1973), this Court recently approved the following instruction which is markedly similar to the language complained of here:

> "As the defendant he has a personal interest in the result of the case and such interest creates a motive for false testimony. The greater the interest, the stronger the motive and the defendant's interest in the result of this trial is of a character possessed by no other witness . . ." (Appellant's Appendix at A-253 in *United States* v. *Sclafani*).

It is clear that no part of Judge Wyatt's charge on credibility strayed beyond language recently approved by this Court. A thorough reading of the Supreme Court case of *Reagan* v. *United States,* 157 U.S. 301 (1895), heavily cited by appellant, reveals nothing which suggests

a different conclusion.* Appellant's claim of error should be rejected.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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* Indeed, the *Reagan* Court approved a strongly worded instruction which stated: "Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert, or withhold the facts. . . The deep personal interest which [the defendant] may have in the result of the suit should be considered." 157 U.S. at 304.

Further, of all the cases cited by appellant on this point, only three were reversed, but none squarely on the grounds raised here. *United States* v. *Howard*, 433 F.2d 505 (D.C. Cir. 1970) reversed the conviction on less than all counts on grounds irrelevant to the jury instructions. The Court in *United States* v. *Reid*, 410 F.2d 1223 (7th Cir. 1969) reversed an assault conviction on two grounds. One was the erroneous introduction of prejudicial evidence and the other on the improper refusal of the court to give a specific defense requested charge on the credibility of government witnesses which had not been opposed by the government. Because the defense was self-defense, the key question was whether the prison guards were truthful in their denial of provoking the assault. In this rather special context and because the prosecution had continually stressed the inherent credibility of government *employees*, the Court found the charge on credibility of witnesses to be unbalanced in making specific reference only to the interest of the defendant in the outcome of the case. *Hicks* v. *United States*, 150 U.S. 442 (1893), preceded *Reagan* and expressly was not reversed because of the credibility instruction alone.

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN, III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of May, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

HOWARD A. HEFFRON, ESQ.
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

RICHARD J. MEDALIE, ESQ.
Epstein, Friedman, Duncan and Medalie
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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III
JOHN D. GORDAN, III

Sworn to before me this

6th day of May, 1974.

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
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No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975